RAMALINGAM S/O MUTHUSAMY v. CHONG KIM FONG; LEMBAGA KEMAJUAN TANAH PERSEKUTUAN — GARNISHEES

[O.C.J. (Ajaib Singh J.) March 14, 1977]
[Seremban — Garnishee Summons in Civil Suit No. 270 of 1975]

Practice and Procedure — Garnishee proceedings — Order against garnishees to pay into court $15,502.10 being sum paid out to judgment debtor — Appeal against order — Whether officers of the Federal Land Development Authority were public officers — Meaning of "public officers" — Land Development Ordinance, 1956, ss. 64 and 65 — Interpretation Act 1967, s. 3 — Federal Constitution, art. 132(1) — R.S.C. 1957, O. 43 r. 5(2).

Garnishment proceedings — When debts may be seized — Whether debts due or payable to the judgment debtor jointly with another could be attached — R.S.C. 1957, O. 43 rr. 5(1) & (2), and 8, O. 45 r. 9(1) — Debtors Ordinance 1957, s. 19.

By specially indorsed writ of summons of October 9, 1975, the judgment creditor as the plaintiff sued the judgment debtor as the defendant for a sum of $29,977.68 being the balance of goods sold and delivered by the plaintiff to the defendant. An application to attach the defendant's property before judgment was made to the court on October 18, 1975 and before the writ of summons had been served on the defendant. An order in terms of this application was granted by the court on October 20, 1975 and the property of the defendant was ordered to be attached before judgment for the amount claimed. On October 20, 1975 a notice of garnishment before judgment was issued by the judgment creditor. Both the order to attach property before judgment and the notice of garnishment before judgment were served on the garnishees on October 20, 1975. On October 29, 1975 the judgment creditor entered judgment for his claim and costs against the judgment debtor by default of appearance. A garnishee summons to examine the garnishees as to any property of the judgment debtor that may be in their possession, custody or control was issued on November 13, 1975 and served on the garnishees on November 14, 1975.

This was an appeal by the garnishees against the order of the Senior Assistant Registrar ordering the garnishees to pay into court the sum of $15,502.40 paid by the judgment debtor after the issue and service of a garnishment notice. It was further ordered that money due to the judgment debtor out of a sum of $7,744.85 being retention money held by the garnishees to the account of the judgment debtor be attached and that the garnishees also pay to the judgment creditor a further sum of $7,963.20 to which the judgment creditor was entitled jointly with another person and which was paid by the garnishees after the issue and service of the garnishment notice. The garnishees submitted that the Federal Land Development Authority was a public body and its servants were public officers by virtue of section 64 of the Land Development Ordinance 1957 and section 65 of the same which extends the provisions of the Public Authorities Protection Ordinance 1948 to members, officers and servants of the Federal Land Development Authority. It was further contended that there must be a debt in existence or accruing as at the date of the service of the garnishment notice otherwise no garnishment notice can be issued. It was also argued that the joint debt of $7,963.20 paid by the garnishees jointly to the judgment debtor and another on one of the contracts could not be attached.

Held: (1) the officers of the Federal Land Development Authority are not public officers within the meaning of Order 43 rule 5(2) of the Rules of the Supreme Court, 1957. Public services under the Interpretation Act means the public services mentioned in article 132(1) of the Federal Constitution which sets out a list of public services. However, the Federal Land Development is not one of the services mentioned in the constitution;

(2) debts which may be seized by a garnishment notice are all those owing or accruing from a garnishee to a judgment debtor at the time of service of the garnishment notice or before the notice is dissolved;

(3) it is clear from the wording of Order 43 rule 5(1) that debts owing or accruing solely to the judgment debtor only and *not* jointly with an other person can be attached under Order 43 rule 5(1); The phrase "whether solely or jointly with others" is restricted to property in the first part of the rule and does not apply to debts in the second half of the rule;

(4) there being no provision in Order 43 rule 5(1) entitling the judgment creditor to attach debts due jointly to the judgment debtor and any other person the attachment of the sum of $7,963.20 was bad and irregular.

Cases referred to:-

(1) *Dunlop & Ranken Ltd.* v. *Hendall Steel Structures Ltd. (Pitchers Ltd. Garnishees)* [1957] 3 All E.R. 344.
(2) *O'Driscoll* v. *Manchester Insurance Committee* 113 L.T. 683 at p. 688.
(3) *Macdonald* v. *The Tacquah Gold Mines Company* [1884] Vol. XIII Q.B.D. 535.
(4) *Hirschhorn* v. *Evans* [1938] 3 All E.R. 491.

[Editorial Note: An appeal to the Federal Court was lodged but subsequently withdrawn.]

GARNISHEE SUMMONS IN CIVIL SUIT.

N. Ramachandran for the judgment creditor.

S. Kulasegaran for garnishees.

Ajaib Singh J.: This was an appeal by the garnishees against the order of the senior assistant registrar made on a garnishment summons ordering the garnishees to pay into court the sum of $15,502.10 being money paid out by the garnishees to the judgment debtor after the issue and service of a garnishment notice. It was further ordered that money due to the judgment debtor out of a sum of $7,744.85 being retention money held by the garnishees to the account of the judgment debtor be attached and that the garnishees also pay to the judgment creditor a further sum of $7,963.20 being money the judgment debtor was entitled jointly with another person and which was paid out by the garnishees after the issue and service of the garnishment notice.

The facts leading to the hearing of the garnishee summons were as follows. By specially indorsed writ of summons dated October 9, 1975 the judgment creditor as the plaintiff sued the judgment debtor as the defendant for a sum of $29,977.68 being the balance of the price of goods sold and delivered by the plaintiff to the defendant. An application to attach the defendant's property before judgment was made to the court on October 18, 1975 and before the writ of summons had been served on the defendant. An order in terms of this application was made by the senior assistant registrar on October 20, 1975 and the property of the defendant was ordered to be attached before judgment for the amount claimed in the writ of summons plus costs fixed at $750. On the same day namely October 20, 1975 a notice of garnishment before judgment was issued by the judgment creditor. Both the order to attach property before judgment and the notice of garnishment before judgment were served on the garnishees on October 20, 1975. The judgment creditor subsequently entered judgment for his claim and costs against the judgment debtor on October 29, 1975 by default of appearance. On November 13, 1975 a garnishee summons was issued to examine the garnishees as to any property of the judgment debtor that may be in their possession, custody or control. This summons was served on the garnishees on November 14, 1975 and was heard by the senior assistant

registrar who made his order on June 11, 1976.

Ayub bin Mohamed the Finance Supervisor of the garnishees filed an affidavit in reply to the garnishee summons. He said that the judgment debtor had three contracts with the garnishees in respect of work on their land schemes. One contract was in the judgment debtor's own name and two contracts jointly with one Tai Mei. Ayub bin Mohamed referred to some of the clauses in the contracts which state *inter alia* that whenever under the contract any sum of money is recoverable from or payable by the judgment debtor such sum may be deducted from or reduced by the amount of any sum or sums then due or which at any time thereafter may become due to the judgment debtor under the contract. Secondly if the judgment debtor fails to carry out any instructions of the superintending officer and within such time as provided in the contract the materials or work so affected may at the option of the superintending officer be made good and the costs incurred thereby are to be deducted from the sum remaining to be paid to the judgment debtor or are to be recovered from him as a liquidated amount by action. Similar provisions are made in the other clauses mentioned in the affidavit which relate to any defects in the work done. With regard to the retention fund it is stated that any balance thereof to the credit of the judgment debtor shall not become payable until after the work is completed and all defects and faults made good. Upon failing to perform or abandoning the work it is stated that the judgment debtor shall pay damages at the rate provided for in the contract and which may be deducted from the money due to the judgment debtor.

In his oral testimony before the senior assistant registrar Ayub bin Mohamed said that the payments under the contracts were made by the garnishees after the service of the garnishment notice. However the dates of these payments, the amounts and the persons to whom the sums were paid as stated by Ayub bin Mohamed in his evidence and in his affidavit were not quite accurate and consistent and I therefore directed him to file another affidavit to show correct particulars of all the payments made out in respect of the three contracts. In compliance with this direction Ayub bin Mohamed filed an affivadit dated September 10, 1976 which disclosed that on the contract which was awarded solely to the judgment debtor three progress payments were made out to him by the garnishees between November 17, 1975 and January 21, 1976 totalling $15,502.10. This contract expired on January 14, 1976 and the garnishees are now having with them a sum of $7,744.95 as retention money which is subject to revision upon the final accounts being completed. The second contract was a joint contract awarded to the judgment debtor and Tai Mei. No sum was paid or due under this contract but the garnishees have with them a sum of $3,600 as retention money which is subject to revision. No more need be said about this second contract because the retention money in this contract was not ordered to be attached by the registrar and the contract is in no other way related to the present proceedings. The third contract was also jointly awarded to the judgment debtor and Tai Mei on which a sum of $7,963.20 was paid to them jointly on November 4, 1975. The work under this contract was taken over by the garnishees on November 15, 1975 and there is no retention money with them.

On appeal before me the parties advanced the same submissions which they had made to the senior assistant registrar. Mr. Kulasegaran for the garnishees submitted that under Order 43 rule 5(2) of the Rules of the Supreme Court any property of the judgment debtor which was in the hands of the garnishees could be seized only with the consent in writing of the Minister of Finance. It was submitted that the Federal Land Development Authority was a public body and its servants were public officers by virtue of section 64 of the Land Development Ordinance 1956 which states *inter alia* that all members, officers and servants of the Authority shall be deemed to be public servants within the meaning of the Penal Code and also by virtue of section 65 of the Land Development Ordinance which extends the provisions of the Public Authorities Protection Ordinance 1948 to members, officers and servants of the Federal Land Development Authority. The senior assistant registrar held against this submission which was taken up before him as a preliminary objection and for myself I would say here at once that the registrar was right in his ruling on the objection.

Mr. Kulasegaran then submitted that under Order 43 rule 5(1) of the Rules of the Supreme Court there must be a debt in existence or accruing as at the date of the service of the garnishment notice otherwise no garnishment notice can be issued. He submitted that in the present case the architect's certificate of the progress payments had not been issued at the date of the service of the notice and the accounts of the work done had not been taken to establish a definite debt. In support of this submission Mr. Kulasegaran cited the case of *Dunlop & Ranken, Ltd.* v. *Hendall Steel Structures, Ltd. (Pitchers, Ltd. Garnishees)*[1] where it was held that in a building contract there can be no debt due or accruing to the contractor until the architect's certificate has been given. Mr. Kulasegaran submitted further that the order of attachment before judgment was also wrong. He said that there must be a judgment in existence before attachment proceedings can be taken and before any garnishment notice can be issued. Lastly it was submitted that the joint debt of $7,963.20 which was paid by the garnishees jointly to the judgment debtor and Tai Mei on one of the contracts cannot be attached under garnishee proceedings.

Mr. Ramachandran for the judgment creditor submitted that Order 43 rule 5(2) refers to a public officer as defined in the Interpretation Act 1967. The officers of the Federal Land Development Authority were not public officers within that definition. With regard to the issue of the garnishment notice he submitted that the notice was issued under Order 43 rule 5(1) which was a local rule and different from the garnishment provisions in the English rules. As for the attachment before judgment it was obtained under the Debtors Ordinance 1957. It was also submitted that under Order 43 rule 5(1) joint debts were liable to be attached by a garnishment notice.

In the course of the proceedings allegations of forgery were made by the judgment creditor against

the garnishees but these allegations were withdrawn during the hearing of the appeal. Similarly a submission advanced earlier by Mr. Kulasegaran that there had been an assignment of a certain sum of money by the judgment debtor to another person and therefore that sum could not be attached was also abandoned. The second affidavit of Ayub bin Mohamed had rendered this submission irrelevant.

Thus there remained four issues to be determined in this matter. First whether under Order 43 rule 5(2) of the Rules of the Supreme Court the consent of the Minister of Finance was necessary before any property in the hands of the garnishees could be seized. Here I agree with Mr. Ramachandran that the officers of the Federal Land Development Authority are not public officers within the meaning of Order 43 rule 5(2) which states that if property liable to seizure by garnishment notice is in the custody or under the control of any public officer in his official capacity then such property shall be so seized only with the consent in writing of the Minister of Finance in the case of a Federal Officer or the Mentri Besar or Chief Minister in the case of a State Officer. Under section 3 of the Interpretation Act 1967 a public officer is a person lawfully holding, acting in or exercising the functions of a public office and public office itself is defined in the Act as an office in any of the public services. Public services under the Interpretation Act means the public services mentioned in Article 132(1) of the Federal Constitution. Article 132(1) of the Federal Constitution sets out a list of public services but the Federal Land Development Authority is not one of the services mentioned therein. Sections 64 and 65 of the Land Development Ordinance 1956 referred to by Mr. Kulasegaran in support of his contention on this point were irrelevant and inapplicable in determining the question in issue. Under these two sections all members, officers and servants of the Federal Land Development Authority are no doubt public servants within the meaning of the Penal Code and are afforded protection under the provisions of the Public Authorities Protection Ordinance 1948 but they do not by virtue thereof become public officers within the meaning of Order 43 rule 5(2) of the Rules of the Supreme Court.

The second question as posed by Mr. Kulasegaran was whether at the time of the issue and service of the garnishment notice the garnishees had any debt owing or accruing from them to the judgment debtor. This question is not altogether an apt one for it presupposes that the answer would be in accordance with the English law which on this particular point is different from our provisions relating to garnishee proceedings. In England it is well settled that at the time when a garnishee order nisi is made there must be in existence a debt owing or accruing to the judgment debtor although the amount at that date is unascertainable and although it is payable at some future date. In the case of *Dunlop & Ranken, supra,* Lord Goddard referred to the case of *O'Driscoll* v. *Manchester Insurance Committee*[2] where Banks L.J. had this to say—

"It has long been established that the expression a debt owing or accruing includes a debt debitum in praesenti solvendum in future. The question which has to be considered in deciding whether any particular debt fulfils the description of a debt owing or accruing is well put at page 808 of the Annual Practice, 1915, where the author says: 'But the distinction must be borne in mind between the case where there is an existing debt payment whereof is deferred and the case where both the debt and the payment rest in the future. In the former case there is an attachable debt; in the latter case there is not'. A case of the latter kind is where the amount is payable upon some contingency, and where it is not possible to say that there is a debt owing or accruing. But the mere fact that the exact amount of the debt has not been ascertained is no answer to the contention that there is a debt debitum in praesenti."

The garnishees might well have succeeded in the present proceedings if the English law was applicable as to the time the debts were owing or accruing in relation to the issue and service of the garnishment notice. The clauses in the building contracts referred to by Ayub bin Mohamed provided for adjustments to be made in the accounts before any sum became due and payable by the garnishees to the judgment debtor. And in one of these clauses reference was made to clause 31 which provided that the judgment debtor was to be paid by way of progress payments only upon the issue of a certificate by the architect. It would have been for the judgment creditor to prove that at the date of the service of the garnishment notice any debt was owing or accruing from the garnishees to the judgment debtor. The judgment creditor however adduced no evidence whatsoever to prove this and in the absence of any evidence that at the date of the service of the garnishment notice debts were owing or accruing from the garnishees to the judgment debtor the judgment creditor would not have been entitled to attach the sums of money paid out by the garnishees after the date of the service of the notice.

But the position under our rules is different. Under Order 43 rule 5 (1) a judgment creditor may issue a garnishment notice and seize not only all debts owing or accruing from any person to the judgment debtor at the time of service of the notice on that person but also all debts owing or accruing from that person to the judgment debtor even after the service of the garnishment notice but before the notice is dissolved. I think it will help if Order 43 rule 5(1) is set out in full—

"5. (1) Any property other than land or any interest therein, or property not liable to seizure, to which the judgment debtor is beneficially entitled, whether solely or jointly with others, and which, *at the time of service of the notice hereinafter mentioned, or before the same is dissolved,* is or shall be in the custody or control of any other person within the jurisdiction *and all debts owing or accruing from any such person to the judgment debtor at or during such time as aforesaid,* shall be seized by a notice in writing (hereinafter called a 'garnishment notice') signed by the sheriff and served on such person (hereinafter called the 'garnishee'). Such notice shall be in accordance with Form 15."

The words which I have italicized in the above rule clearly show that debts which may be seized by a garnishment notice are all those owing or accruing from a garnishee to a judgment debtor at the time of service of the garnishment notice or before the notice is dissolved. In the present proceedings the garnishees admitted that they had paid out money due to the judgment debtor after the garnishment notice had been served on them and there was no evidence whatsoever that the notice had been dissolved. Order 43 rule 8 provides *inter alia* that any payment to the judgment debtor of any debt seized by garnishment

notice, otherwise than by leave of the court or a judge, shall be void as against the sheriff and any person on whose behalf the debt was seized. This means that if payments are made out by the garnishees after service of the garnishment notice attaching debts of the judgment debtor the garnishees are liable to pay up the sums again to satisfy the attachment.

On the third point in issue Mr. Kulasegaran submitted that there must be a judgment in existence before any attachment proceedings can be taken. He said that the order of attachment before judgment taken out by the judgment creditor against the judgment debtor was wrong because there was no judgment in existence when the order of attachment before judgment was made. With respect, I disagree. Section 19 of the Debtors Ordinance 1957 provides for the attachment of a defendant's property (and this includes debts due to the defendant from a third party) at any time after the issue of a writ of summons and under certain conditions as set out in the section. Section 19 of the Debtors Ordinance is clearly designed to ensure that a plaintiff who has a good cause of action against a defendant is not deprived from levying execution against the property of the defendant in the event of the plaintiff obtaining judgment in his action against the defendant.

Now to deal with the last point. It will be seen from Order 43 rule 5(1) that both property and debts are liable to be seized by a garnishment notice, property to which the judgment debtor is beneficially entitled whether solely or jointly with others and debts owing or accruing to the judgment debtor. It was agreed by the parties and I concurred with their view that the progress payments made by the garnishees under the building contracts constituted debts and not property within the meaning of those terms in rule 5(1) and the question here was whether the debt in the sum of $7,963.20 owing from the garnishees to the judgment debtor jointly with Tai Mei under their joint contract could be attached by garnishment notice. I would say No. In my view it is abundantly clear from the working of rule 5(1) that debts owing or accruing solely to the judgment debtor only and not jointly with any other person can be attached under Order 43 rule 5(1). The phrase "whether solely or jointly with others" is restricted to property in the first part of the rule and does not apply to debts in the second half of the rule. The words "all debts owing or accruing... to the judgment debtor" which appear in the second half of the rule are quite plain and mean only what they say; debts must be owing or accruing to the judgment debtor and not to the judgment debtor jointly with another person. The deliberate omission of the phrase "whether solely or jointly with others" in the second half of Order 43 rule 5(1) is a clear indication of the legislature's intention that joint debts shall not be seized by a garnishment notice.

There appears to be no local authority whether or not joint debts can be attached by garnishment notice but some assistance can be afforded by considering two English authorities which I think are in point. In the case of *Macdonald* v. *The Tacquah Gold Mines Company*[3] it was held that a debt owing by a garnishee to a judgment debtor which can be attached to answer the judgment debt must be a debt due to such judgment debtor alone and where it is only due to him jointly with another person it cannot be so attached. In the case of *Hirschhorn* v. *Evans*[4] it was held following the principle stated in *Macdonald's case, supra*, that a joint account with a bank cannot be attached under a garnishee order in respect of a debt owed by one of the joint owners.

In the present case a sum of $7,963.20 was paid out jointly to the judgment debtor and Tai Mei on November 4, 1975. This payment was a joint debt owing from the garnishees under one of the two contracts which was awarded jointly to the judgment debtor and Tai Mei. There being no provision in Order 43 rule 5(1) entitling the judgment creditor to attach debts due jointly to the judgment debtor and any other person the attachment of the sum of $7,963.20 was bad and irregular. In the event I varied the order of the senior assistant registrar by ordering that the sums of money paid out by the garnishees and the retention money on the contract which was awarded solely to the judgment debtor remain attached but that the sum of $7,963.20 which was a joint debt under the contract awarded to the judgment debtor and Tai Mei be released.

On the question of costs Mr. Kulasegaran referred to Order 45 rule 9(1) of the Rules of the Supreme Court and submitted that costs should be awarded to the garnishees. Order 45 rule 9(1) states that the "Court or a Judge may allow a reasonable sum to a garnishee or other claimant for costs and expenses, and for compensation for his attendance and loss of time, in any case in which it appears just to do so." However, I was of the view that in the circumstances of this case the garnishees were not entitled to costs under Order 45 rule 9(1) but that they themselves ought to pay the costs of the proceedings to the judgment creditor. The garnishees had paid out the money owing from them to the judgment debtor in utter disregard of the garnishment notice which prohibited them from doing so and they were in no position now to avail themselves of Order 45 rule 9(1). On the other hand the judgment creditor had wrongfully attached about a third of the total sum of money involved in this case and for that reason costs which may be awarded to him should be reduced accordingly. In all the circumstances therefore I ordered that two-thirds of the taxed costs of the proceedings here and before the senior assistant registrar be paid by the garnishees to the judgment creditor.

Order accordingly.

Solicitors: *N. Ramachandran; S. Kulasegaran.*